TERRELL, AG. C. J.—The Plaintiff is a singing girl and sues on two deposit receipts, each for $2,500, and alleged to have been given in respect of moneys deposited by her with the defendant firm on the 26th June, 1934, and the 1st July, 1935, respectively. At all material times one Wong Yoke Man was the manager of the defendant firm in Singapore.

The headquarters of the firm are in Kuala Lumpur. It is a prosperous and old established business which has apparently never been in financial difficulties. There are five partners of whom Wong Yoke Man's father is one.

The Singapore branch was merely a purchasing and forwarding agency. The Manager's duties were to make purchases from traders in Singapore, and forward the goods to Kuala Lumpur, to arrange for the forwarding to Kuala Lumpur of goods purchased from China, and to send up-country goods which the head office had sold in other centres. Three times a month the agent received drafts to enable him to pay for the goods purchased in Singapore, and such drafts were paid into an account at the Overseas Chinese Bank upon which the agent had power to draw.

The agent's powers were not defined by any agreement in writing, nor did he have a power of attorney from the partners. According to the evidence of Wong Fook Whye, the manager of the head office in Kuala Lumpur, the Singapore agent had no authority to borrow money. I accept this evidence without hesitation in view of the fact that for the purpose of the business of the Singapore branch, borrowing would never be necessary, and that the books of the firm contain no record of any loans or of the deposit receipts upon which the Plaintiff sues. An agent, unlike a partner, has no implied authority to borrow money unless it is necessary for the purpose of his duties, and there was no evidence that the agent had been held out as having any such authority. It is true that Wong Yoke Man did borrow money and used the firm's name on other occasions, but there is no evidence that the Plaintiff knew of these other borrowings, or relied on the apparent scope of the agent's authority. The partners certainly did not know, and as I have said no entry of these transactions was made in the firm's books. Wong Yoke Man merely kept a record on slips of paper for his own information.

The fact was that Wong Yoke Man, who held a very responsible position as manager of the Singapore branch, was expected to maintain himself with his wife and family of three children on a salary of $45 a month. This he was quite unable to do, and used the firm's moneys for his private expenses. When the time came to pay the firm's debts he had to borrow money to make up his defalcations and then borrowed more money to meet his previous commitments when they fell due. For the purpose of these borrowings he used the firm's chop. One of the lenders, one Ang Kai Pan, a rice and steamer merchant, advanced money on the security of Promissory Notes. He made no inquiries as to whether Wong Yoke Man had any authority to borrow—he merely "looked to the seal." But the mere possession of the seal does not extend an agent's actual, implied or ostensible authority to borrow money, when such borrowing is not necessary for the firm s business. [See *A. T. K. P. L. Palaniappa Chetty* vs. *Chop Nam Kee*, (1913) S.S.L.R. p.6 and the judgment of Sproule J. at p.10.].

The only point which caused me any difficulty was the argument that the Chop had benefited by these borrowings, and that accordingly the Plaintiff was entitled to recover to the extent of such benefit, even if the borrowing was outside the scope of the agent's authority. [See *Reversion Fund and Insurance Company, Limited* v. *Maison Cosway Limited*, (1913) 1 K.B., p.364]. But when the facts of the present case are examined it will be seen that the Chop did not benefit in any way from the agent's borrowings. It would have been different if the borrowings had been made for the purpose of liquidating trade debts for which the Chop would in any case be liable, but that was not the position. The agent was indebted to the Chop, not the Chop to the agent. When the agent borrowed money in the name of the firm to reduce his own indebtedness, he did not relieve the firm of any existing liability. On the contrary he sought to impose a fresh liability which did not previously exist. The principle therefore of a lender recovering to the extent of the benefit enjoyed by an unauthorised agent's principal, does not apply.

In the result therefore the Plaintiff's claim fails and must be dismissed with costs.

Action dismissed.

Solicitors for the Plaintiff—
Shelley-Thompson & Demuth.

Solicitors for the Defendants—
Mallal & Namazie.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., THOMAS, C.J. (F.M.S.) and HOWES, J.

August 9, 1937

ALKAFF & COMPANY.....Appellants.

v.

THE GOVERNOR-IN-COUNCIL & ORS.

Respondents.

Writ of Certiorari—Backlane Orders—Report by Commissioner of Lands—Allegations of bias.

The Commissioner of Lands is an *ex officio* member of the Singapore Improvement Trust. Upon application made by the Singapore Improvement Trust, the Governor-in-Council appointed the Commissioner of Lands to

enquire and report on three back lane proposals made by the Singapore Improvement Trust under S. 144 subsection 1 of Ordinance No. 135 (Municipal) and section 2 subsection 2 of the Singapore Improvement Ordinance, 1927. That officer enquired and subsequently the Governor-in-Council made three several backlane orders. Applications were made by the applicants for a writ or writs of *certiorari* to quash such three backlane orders. On such applications a rule was made. His Excellency The Governor and the Officer Administering the Government showed cause before Mr. Justice Whitley, Ag. C.J., who discharged the rule. On appeal to the Court of Appeal (Terrell, Ag. C.J., Thomas, C.J. (F.M.S.) and Howes, J.).

Held, (Thomas, C.J., dissenting) 1. that the orders could properly be made personally against the Governor and the Officer Administering the Government respectively.

2. That the Commissioner of Lands in enquiring and reporting on the backlane proposals and making recommendations to the Governor-in-Council was acting in a quasi-judicial capacity and that the order of the Governor-in Council must be treated as a quasi-judicial act.

3. That justice must not only be done but must also seem to be done. The fact that the Commissioner of Lands, who as a member of the Singapore Improvement Trust had approved the backlane schemes, had subsequently as the officer appointed under section 144 (1) of the Municipal Ordinance, inquired into the merits of the schemes, resulted in a suspicion that justice might not be done. The Commissioner of Lands was therefore disqualified from acting in the latter capacity, irrespective of his actual conduct of the inquiry.

4. To constitute waiver it must be shown that the applicant, being aware of the point of objection that might be taken, refrains from taking it and that on the part of his solicitor there must be an intention to forego his client's right of objection.

APPEAL.

Messrs Alkaff & Company, the applicants, applied by way of originating motion for writs of *certiorari* to bring up three orders made by the Governor-in-Council under Section 144 of Ordinance No. 135 (Municipal) and quash such orders. Two of the orders had been made by Sir Andrew Caldecott (the Officer Administering the Government of the Straits Settlements during the absence of the Governor) and the third order had been made by the then Governor H. E. Sir Cecil Clementi. In each case an application had been made by the Singapore Improvement Trust under section 114 of Ordinance No. 135 (Municipal) and section 2, subsection 2 of the Singapore Improvement Ordinance, 1927 requesting the Governor-in-Council to order that a backlane be laid out. In each case the Governor-in-Council (or the Officer Administering the Government, as the case may be), had referred the matter to the Commissioner of Lands for enquiry and report under section 144, subsection 1 of Ordinance No. 135 (Municipal). By section 5, subsection 2 (d) of the Singapore Improvement Ordinance, 1927, (as amended by the Singapore Improvement (Amendment) Ordinance, 1930) the Commissioner of Lands became an *ex officio* Trustee of the Singapore Improvement Trust. The Commissioner of Lands enquired and reported; and thereafter the Governor-in-Council (or the Officer Administering the Government, as the case may be) made a backlane order under section 144 subsection 1 of Ordinance No. 135 (Municipal) in each of the three cases. Objection was taken by the Applicants to the appointment of the Commissioner of Lands on the ground of bias and also on the ground that he had not complied with the requirements of natural justice in making his enquiries and reports. The applicants moved *ex parte* and on their application a rule was made against Sir Andrew Caldecott, Sir Shenton Thomas and Mr. W. S. Ebden the Commissioner of Lands calling on them to show cause why a writ or writs of *certiorari* should not issue to bring up and quash the three orders. The Governor and the Officer Administering the Government appeared to show cause, but upon the matter coming on for hearing Counsel for the Applicants (Messrs Alkaff & Co.) informed the Court that they did not wish to proceed further against Mr. W. S. Ebden. the Commissioner of Lands. Mr. Justice Whitley, Acting Chief Justice, before whom His Excellency the Governor Sir Shenton Thomas and the Officer Administering the Government showed cause discharged the rule. Against this decision, which was reported in (1937) 6 Malayan Law Journal 28. the Applicants appealed.

Battishill (*Seth* with him) for the Appellants.

Roland Braddell (*Ong* with him) for the Respondents.

Cur. Ad. Vult.

TERRELL, AG. C. J.—On the 11th June, 1935, the appellants Messrs. Alkaff & Company obtained a rule *nisi* for *certiorari* directed to His Excellency Sir Thomas Shenton Whitelegge Thomas, K.C.M.G., O.B.E., the Hon'ble Sir Andrew Caldecott, Knight, C.M.G., C.B.E., as officer administering the Government and The Hon'ble Mr. W. S. Ebden, the Commissioner of Lands, calling upon them to show cause why certain orders approving of back lanes should not be removed into the High Court and be quashed.

The proceedings against the Commissioner of Lands has been dropped, and the rule is only sought in respect of certain orders made by the Governor in Council, or the officer administering the Government in the absence of the Governor. Such latter orders are for the purpose of this appeal orders of the Governor in Council.

The acting Chief Justice, Mr. Justice Whitley, refused to make the rule absolute, and it is against this decision that the relators appeal to the Court of Appeal.

An objection was taken in the Court below, and again in the hearing of the appeal that the proceedings were wrongly constituted, in that relief is sought against the Governor, and not against the Governor in Council. On this aspect of the case I have had the advantage of reading the judgment of the learned Chief Justice of the F.M.S., with which I respectfully agree. I would only add in support of the conclusion to which

he has come that in section 144(1) of the Municipal Ordinance the subsection reads: "The Governor in Council may after receiving such report as *he* may think fit." A similar expression is used in two sections of the kindred Improvement Trust Ordinance. Section 55, which deals with a general improvement plan, provides that the Governor in Council may approve such plan or may reject it or may approve it with such conditions or modifications as *he* may think fit. So also under section 80 the Governor in Council may approve an Improvement Scheme or may reject it, or may approve it "with such conditions and modifications as *he* thinks fit."

The form of words used in all these cases, where certain statutory duties are placed upon the Governor in Council, only serves to emphasise the fact that although the Governor receives the advice of his Executive Council, the act is the act of the Governor himself, and that relief in such cases must be sought against the Governor.

The grounds upon which the rule *nisi* for *certiorari* was obtained may be summarised as follows:

(1) that the officer appointed under section 144(1) (now section 148(1)) of the Municipal Ordinance ought to have been an impartial officer and that as Mr. W. S. Ebden was a Member of the Improvement Trust, he was not an impartial officer

and (2) that Mr. Ebden did not conduct the inquiries in an impartial or judicial manner.

Under (2) particulars are given of the various matters complained of.

The appellants also argued (3) that Mr. Ebden had shown actual bias in that as a Member of the Improvement Trust he had already approved the back lane schemes and was therefore prejudiced in favour of such schemes.

I do not think that this third ground of objection is open to the appellants. I cannot find that it is raised in the order for a rule *nisi*; no application for amendment was made, and the appellants must be confined to their original case. If I am wrong in this I consider that the objection must fail for the reasons given by the learned acting Chief Justice.

I also consider that the second objection fails. The learned acting Chief Justice summarised his conclusions on this point as follows: "He (Mr. Ebden) was in fact completely unbiassed. He conducted his inquiry in each case methodically and exhaustively and with the most fairness and impartiality." With this conclusion and with the reasons given by the learned acting Chief Justice I respectfully agree.

The first objection referred to above gives rise to greater difficulties. The objection may be referred to as one of legal as opposed to actual bias. The general principle is quite clear—"nothing is to be done which creates even a suspicion that there has been an improper interference with the ordinary course of justice." *per* Avory J. in *Rex* v. *Essex Justices*, (1927) 2 K.B. p.475 at p.488.

In order that Mr. Ebden's position in conducting the inquiry may fall within that principle, it is first necessary for the Court to be satisfied that he was acting in a judicial or quasi-judicial capacity. The learned trial judge has held (p.231 of the Record) that Mr. Ebden was himself not even exercising quasi-judicial functions, but was merely inquiring and making a report and recommendation to those who were exercising such functions. I take this to mean that although the Governor in Council would be acting quasi-judicially in ordering the back lanes to be laid out, Mr. Ebden's functions in inquiring, reporting and recommending were purely administrative. The learned acting Chief Justice refers to the earlier provision, section 137(1) of the Municipal Ordinance of 1913, which provides for the owners being heard in person or by counsel, before the Governor in Council orders a back lane to be laid out. I do not think that it could be argued that under this provision the Governor in Council would not have acted in a quasi-judicial capacity. Under the present section all that is altered is the procedure. Instead of the owners having the right to be heard orally before the Governor in Council, the function of inquiring into the case is delegated to an officer who is especially appointed to "inquire and report." It is quite evident from the evidence of Mr. Ebden himself, and from the procedure actually followed, that Mr. Ebden did hold an inquiry, and not merely reported, but also made recommendations, which were in fact accepted by the Governor in Council. I think it follows that some, at all events, of the quasi-judicial functions which were vested in the Governor in Council under the previous legislation, have now devolved upon the officer appointed to inquire and report under section 144 (1), and if Mr. Ebden's inquiries are open to criticism on any ground, I think that such criticism must also affect the order of the Governor in Council made in pursuance of the inquiry and the recommendations. I do not think that it is relevant to consider whether the Governor in Council in approving the recommendations merely performs an administrative act, because the inquiry and recommendations cannot be separated from the order made thereon, and are part and parcel of the decision finally made. I find therefore that Mr. Ebden was acting in a quasi-judicial capacity, and that the order of the Governor in Council must also be treated as a quasi-judicial act.

The general principles affecting the possibility of bias apply both to the case of justices, and to assessment committee, the former acting judicially and the latter quasi-judicially.

In *Rex* v. *Essex Justices Ex parte Perkins*, (1927) 2 K.B. 475 a clerk to a solicitor conducted the solicitor's business. A lady consulted this clerk about the preparation of a separation deed, no mention being made of the matter to the solicitor except in a short reference in a weekly report from the clerk. The solicitor acted for the justices as their clerk when they made a maintenance order in favour of the wife, and the husband alleged bias. It was considered immaterial whether or not the solicitor actually advised the justices, as was also the fact that he was not even aware that, through his clerk, he was acting for the wife. In this case at p.488 Avory J. quoted with approval the following passage from the judgment of Lord Hewart in *Rex* v. *Sussex Justices; ex parte McCarthy*, (1924) 1 K.B. p.256 at p.259:

> "A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should undoubtedly and manifestly be seen to be done . . . . . The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice..... His twofold position was a manifest contradiction."

In the case of the Essex Justices although the Justices' clerk retired after the hearing with the Justices, and was asked by them to express his opinion, such opinion was actually in favour of the husband, as it was on his advice that the Justices adjourned the matter in lieu of making the permanent order which they were prepared to make. Obviously therefore there was no actual bias, and it was only the fact that the clerk to the Justices was in a dual position, which prevailed on the Court to quash the proceedings by *certiorari*.

In the case of *King* v. *Assessment Committee for North-Eastern Assessment Area of Surrey, Ex parte F. W. Woolworth and Company, Limited*, (1933) 1 K.B. p.776 the objection was that the county valuation officer was present with the assessment committee, when a proposal came before the Committee to amend the valuation list in respect of certain premises. The rule applicable is very clearly stated by Avory J. in his judgment at p.786:

> "I am of the same opinion. I think that Mr. Lake, being in the position of county valuation officer, might reasonably be suspected by ratepayers and persons appearing before the Assessment Committee of having a real bias in regard to a question of the valuation of premises within the county. I cannot doubt that, if in a particular case any difference of opinion arose in the Assessment Committee, they would refer to the county valuation officer, if present, for his advice and assistance. The mere fact that he did not in the present case tender any advice or assistance is clearly shown by the authorities not to be sufficient of itself to get rid of the disqualification."

The only other authority to which I need refer in this part of the case is *Rex* v. *Salford Assessment Committee*, (1937) A.E.R. Vol. 2 p.98.

In that case the head note reads as follows:

> "The respondent committee resolved to appoint as clerk one B., who was an officer in the town clerk's department of the city of Salford, the corporation being the rating authority. B. was chief committee clerk to the city council, and as such he attended meetings of the rating committee of the city council for the purpose of taking minutes of its proceedings. Apart from recording such proceedings, he was not in any way concerned with its decisions, and took no part, advisory or otherwise, in them. As clerk to the assessment committee, B. acted in an administrative capacity, and advised the committee upon the proper procedure, making the proper entries in the valuation lists of the amendments authorised by the decisions of the committee, but taking no part in such decisions, although he was present while the committee considered them. The appellant, whose application to the assessment committee was being opposed on behalf of the rating committee sought to prohibit B. from acting as clerk to the assessment committee:—
>
> *Held* (Greene, L.J., dissenting) although the mere duplication of offices in the rating and assessment committee was no ground in itself for prohibiting B. from acting as clerk to the assessment committee, the fact that the assessment committee performed quasi-judicial functions and that there was a possibility of

bias or of apparent bias made it undesirable, in the circumstances, that B. should act as clerk to the assessment committee."

I think it is clear from a perusal of the judgment in the above case that the possibility of bias was a mere scintilla. The majority of the Court however were of opinion after reviewing the previous cases that the rule *nisi* for prohibition must be made absolute. As Slesser L.J. stated at p.105:

> "It is the particular fact that Mr. Brown, who must be taken for the reasons I have stated, to have knowledge of all the transactions of the rating authority at which he takes minutes, advises the assessment committee of the same area on procedure, which makes it impossible for me to hold that this is a case where justice appears manifestly and undoubtedly to be done."

So in the present case the fact that Mr. Ebden, was a Member of the Improvement Trust, which had approved the back lane schemes, and had then, as the officer appointed under section 144(1), inquired into the merits of these same schemes, could only result in a suspicion that justice might not be done. As a result of Mr. Ebden's dual position therefore, irrespective of his actual conduct of the inquiry, I feel bound to hold that the rule applies.

Then it is said that if the appellants had a right to object they have waived such right. Mr. Braddell, for the Respondents, puts it in rather a different way. He argues that a writ of *certiorari* should never be granted on the grounds of want of jurisdiction, unless the applicant has taken the objection on which he relies at the earliest opportunity, or has shown by affidavit that neither he nor his solicitor were aware of the facts which would have entitled him to raise the objection.

The actual position is set out in paragraph 10 of the affidavit of Mr. Afifi sworn on the 13th May 1935, and in paragraph 5 of his further affidavit sworn on the 8th August 1936. From these affidavits it appeared that Mr. Afifi himself, as representative of the relators, had no knowledge that Mr. Ebden was also a member of the Improvement Trust until November 1934 when the inquiries had been closed, and that Mr. Mundell, his solicitor, although he had the necessary knowledge in connection with proceedings on behalf of other clients, had forgotten about it, until reminded by Mr. Afifi himself in connection with these proceedings in November 1934. It is argued by the respondents that while the proceedings were pending, the relators' solicitor at all events had the necessary knowledge and that in any case the knowledge must be imputed both to the relators and to their solicitor, as since 1930, the Commissioner of Lands has been a member of the Improvement Trust under the provisions of the Singapore Improvement Ordinance itself, section 5 (2) (d), and, that being the case ignorance of the law is no excuse.

It was formerly held that a writ of *certiorari* would not be granted *ex debito justitiae*, but the practice now is that where the application is by the person aggrieved, and not merely by a member of the public, the writ will always issue where sufficient grounds exist, unless the applicant has by his conduct precluded himself from taking the objection (see *per* Blackburn J. in *Queen* v. *Justices of Surrey*, (1870) L.R. 6 Q.B. p.466). In the course of his judgment Blackburn J. makes reference to the earlier cases of *Queen* v. *South Holland Drainage Commissioners*, (1838) 8 A. & E. p.429. In that case the applicant, whose land had been taken under the South Holland Drainage Act, applied for a *certiorari* to bring up the inquisition held before a compensation jury. One of the grounds of the application was that the notice of the inquisition was insufficient. It appeared however that the applicant himself had requested for his own benefit that the inquiry might take place at an earlier period than that which a regular notice would have assigned. It was held that he had waived an objection which otherwise would have been fatal.

This was clearly a case in which the applicant had estopped himself by his own conduct from obtaining the relief to which he would otherwise have been entitled.

It would seem to be in accordance with this practice that it has been held to be necessary, at all events where the matter complained of is an interest in the justices trying a case, to require the applicant to state on affidavit that he did not know of the objection at the hearing. In *Short and Mellors'* The Practice of the Crown Office, 2nd edition, p.51 it is stated that there must be an affidavit that neither the applicant *nor his solicitor* knew, but the only authority cited for that proposition, *Rex* v. *Kent Justices*, 44 J.P. 298, is contained in a report not available in this Colony.

The proposition is, however, also stated in the case of *Rex* v. *Justices of Richmond Surrey*, (1860) 8 Cox C.C. p.314 which is not referred to in *Short & Mellor*. In that case the objection was raised that the justices had an interest in a fine of 1/– imposed on the applicant, by reason of the fact that three of the justices were also vestrymen, and, as such, the fine would go to them. The applicant swore an affidavit denying knowledge, and there was also an affidavit by the attorney. But the latter affidavit did not state that the attorney was ignorant and the Court drew the conclusion that he was not ignorant, and if so should have raised his objection at the hearing. It is clear that in this case there was no substance in the objection, the financial interest of the Justices being negligible. Nevertheless, a

rule *nisi* was granted on the allegation of some financial interest, though the rule was subsequently discharged on the ground that the objection was *strictissimi juris*, that there were no merits, and that the attorney had not shown any absence of knowledge.

In the case of *Rex* v. *Williams*, (1914) 1 K.B. 608 Channell J. at p.613 stated the rule to be as follows:

> " It is the rule of this Court not to grant a writ of *certiorari* except upon an affidavit which negatives knowledge *on the part of the applicant.*"

At p.614 of the same judgment Channell J. holds that if a party does not comply with this requirement, the issue of the writ is discretionary, and not *ex debito justitiae*. As the Court was of the opinion that the connection of the justice in question with the matter in dispute was merely nominal, and his interest infinitesimal, the Court exercised its discretion in discharging the Rule, but the readiness with which the writ will be granted where there is even a suspicion that one of the Justices is interested is shown by the following observations of Channell J. at p.614:

> " We incline to the view that he did not take an active part, but that he remained on the Bench. Although no harm was done by his so acting, nevertheless if the granting or refusing of this writ depended solely on whether this justice acted or not, the Court would probably not have thought it right to discharge the rule upon this evidence."

The question then arises that, if the applicant had the necessary knowledge, must he then be presumed to know the legal consequences which might entitle him to raise an objection?

This aspect of the case was fully dealt with by the Divisional Court in The *King* v. *Essex Justices, ex parte Perkins*, (1927) 2 K.B. p.475 referred to above. The applicant in that case was perfectly well aware that the clerk to the justices was the solicitor acting for his wife who was trying to obtain a maintenance order against him. He made no objections at the time, and he was unable to swear that he did not know of the dual position of the clerk to the Justices. It was argued that the applicant, knowing the position, could not be heard to say that he was not aware that he had a right in law to object to the employment by the justices of a clerk who might, as he supposed, be biassed against him. The Court however found that he had not lost his right to object, and the following passage may be quoted from the judgment of Avory J. at p.489:

> " He knew the fact therefore that the clerk to the justices was a member of the firm which had acted for his wife. He goes on: "I was not aware at the time that I could make an objection to his conducting the proceedings or advising the magistrates or retiring with them. The question is whether in these circumstances the applicant can be said to have waived his right to make the objection. In answering that question we ought, in my view, to act upon the principle laid down by Lord Romilly M.R. in *Vyvyan* v. *Vyvyan* in these words: 'Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim.' It cannot be said that the applicant was fully cognizant of his right to take objection to the clerk to the justices acting as such, and, that being so, he did not waive that right by failing to exercise it."

It is now necessary to consider the facts of the present case in the light of the authorities quoted above, and I find that so far as the applicant himself is concerned he complied with the rule in stating upon affidavit that he did not have the necessary knowledge. In a case such as the present I do not think that the fact that the Commissioner of Lands was named in another Ordinance as a member of the Improvement Trust affects the matter, or that Mr. Afifi must necessarily be presumed to have had that knowledge. If however for the purpose of argument, Mr. Afifi must be presumed to have had a knowledge which he did not in fact possess, the maxim " Ignorantia legis non excusat" cannot mean that for all intents and purposes, he must be presumed to have known the legal consequences of Mr. Ebden's dual position. If waiver presupposes an intention to forego a right, then certainly there was no waiver on Mr. Afifi's part.

As regards the solicitor, Mr. Mundell if an affidavit negativing knowledge is required, it would appear that the solicitor's knowledge of the fact that Mr. Ebden was also a member of the Improvement Trust was knowledge acquired in other proceedings and which he had forgotten, and I agree with the finding of the learned acting Chief Justice that such knowledge cannot be imputed to the detriment of the applicant. If however a knowledge of the provisions of the section 5 (2) (d) of the Singapore Improvement Ordinance must be imputed to Mr. Mundell, it would still appear to be necessary to show that Mr. Mundell deliberately refrained from taking a point which was open to him. I would refer to the case of *Rex* v. *Sussex Justices ex parte McCarthy*, (1924) 1 K.B. p.256 where Lord Hewart L.C.J. at p.259 says:

> " In those circumstances I am satisfied that the conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be

taken, refrained from taking it, and took his chance of an acquittal on the facts and then, on a conviction being recorded, decided to take the point."

This case appears to be an authority for the proposition that in order to constitute waiver there must be an intention on the solicitor's part to forego his client's right. On the facts of the present case I find it impossible to hold that there was any such intention on Mr. Mundell's part.

In my opinion therefore the applicants have complied with the rule which has been laid down in the cases cited above, and having put on affidavit their want of knowledge, are entitled to the writ *ex debito justitiae*.

If I am wrong on this point and the issue of the writ is discretionary, I think that the Court's discretion should be exercised in favour of the applicants. The objection is not a mere technicality as it was in the cases of *Rex* v. *Justices of Richmond*, and *Rex* v. *Williams* above referred to. The objection in the present case is a very substantial objection to the jurisdiction, in a matter of statutory quasi-judicial functions. The objection is in substance that Mr. Ebden notwithstanding that he was a member of the Improvement Trust, which had put forward certain back lane schemes, later acted judicially in the very same cases.

It is beside the point that in fact Mr. Ebden conducted his inquiries fairly and impartially. As Swift J. said in *Rex* v. *Essex Justices*, (1927) 2 K.B. at p.490:

> "It is essential that justice be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiassed."

I would accordingly allow the appeal with costs here and below and make the rule *nisi* for *certiorari* absolute. The deposit should be paid out to the appellants or their solicitors.

THOMAS, C.J. (F.M.S.)—This is an appeal from the judgment and order of Acting Chief Justice Whitley discharging a rule *nisi* directed to His Excellency Sir Thomas Shenton Whitelegge Thomas, K.C.M.G., Governor of the Straits Settlements and others.

The first question for the consideration of the Court is one taken by the Advocate for the respondents. Although there is no cross-appeal since the eventual decision of the Acting Chief Justice was in favour of the respondents, the appellants have been notified that the respondents intended to ask the Court to reverse the finding made by the learned Acting Chief Justice in the course of his judgment to the effect that the "Governor himself is the proper person to be sued when the subject considers himself aggrieved by the making of any order by the Governor-in-Council and that accordingly the proceedings were properly constituted."

If a question of State of importance were at issue, I could understand why such a point should be taken, but I confess that I am at a loss to see why it should be taken in connection with the provision of back lanes. Even if the point is a good one, it might well have been waived by the Government, provided of course that it was fully understood that the waiver should not be regarded as a precedent for more important occasions. However, the point has been raised, and I will endeavour to deal with it, but I wish to restrict the ruling that I give to matters of no higher importance than back lanes.

Now, there is practically no authority with regard to this question, dealing with the powers of Governors. The powers of a Governor were considered in the case of *Musgrave* v. *Pulido*, 5 A.C. page 102. In the judgment delivered by Sir Montague E. Smith a number of authorities were referred to, and at page 111 it was said:—

> "It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it."

And in the case of *De Verteuil* v. *Knaggs*, (1918) A.C. 557, it was stated by Lord Parmoor that:—

> "It is clearly within the power and jurisdiction of the Municipal Courts to entertain a question whether an order has been made under a proper and statutory exercise of a discretion vested in the Acting Governor and to determine whether the Acting

Governor in making an order, acted within the limits of the powers conferred on him by a Municipal ordinance."

And in the case of *Eshugbayi Eleko* v. *The Government of Negeria (Officer Administering)*, (1931) A.C. 662, it was stated by Lord Atkin that:—

"A suggestion was made by one of the learned Judges that the order in this case was an act of state. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to enquire into the legality of the Act."

Now, it is not questioned in the present case that if this had been an act to be done by the Governor and actually done by the Governor, the Courts could take cognizance of it. But it is argued that the act was to be done by the Governor in Council and if the Courts could take cognizance of it then the rule *nisi* should have been directed not to the Governor but to the Governor-in-Council.

In the Letters Patent of the 31st of March 1911 provision is made for the Executive Council. In the Letters Patent dated the 18th of August 1934, Article VIII provides that:—

"the Executive Council shall not proceed to the despatch of business unless two members at the least (exclusive of himself or of the member presiding) be present and assisting throughout the whole of the meeting at which any such business shall be despatched."

Article X provides that "the Governor shall attend and preside at all meetings of the Executive Council, unless prevented by illness or other grave cause, and in his absence any member appointed by him in writing shall preside, or in default of such member the senior member of the council actually present shall preside."
Article XIV is as follows:—

"The Governor in the exercise of the powers and authorities granted to him by the above recited Letters Patent, or any other Letters Patent adding to amending or substituted for the same, may act in opposition to the advice given to him by the Members of the Executive Council, if he shall in any case deem it right to do so, but in any such case he shall fully report the matter to us by the first convenient opportunity with the grounds and reasons of his action."

From these articles it would seem that the Executive Council is a purely advisory body and that the Governor is not obliged to act upon the advice which he receives.

Now, by the Interpretation Ordinance (Chapter 2), Governor in Council means the Governor in Executive Council. So that Governor in Council comes to mean the Governor having received the advice of the Executive Council. When powers have been conferred on the Governor in Council, it would of course be essential that the Governor should receive the advice of the Executive Council to comply with the requirements of the law. And when an order is made it is necessary to say it is the order of the Governor in Council to indicate that the law has been complied with, and that the advice of the Executive Council has been received. But apart from the statement that the advice has been received the act is still that of the Governor, and he is responsible for it as for any other of his acts. The fact that he has received advice does not make him any less responsible. He is unable to obtain any protection from having acted upon advice which he is not obliged to follow.

I am, therefore, of the opinion that Governor in Council is only another way of saying the Governor. And I consider that when proceedings are taken, they are more correctly instituted against the Governor himself than under any other title applicable to the Governor for special purposes. Accordingly I see no reason to say that the finding of the learned Acting Chief Justice was not correct.

I now turn to the various points raised by the appellants. Section 148 of Chapter 133 is as follows:—

"The Governor in Council may at any time on the request of the Commissioners, after receiving such report as he may think fit to call for from an officer appointed to inquire and report in each case, order that a back lane, with approaches thereto if necessary, of a width not exceeding twenty feet shall be laid out through any lands, and that the lands specified in the order may be acquired by the Commissioner for the purposes of providing such back lane and approaches, if any."

It seems clear from this that the officer appointed to inquire and report would be in a judicial position and must act judicially. Whilst it was not admitted that the officer was a judicial officer, it was claimed that he did in fact act judicially. Whether he is or is not a judicial officer depends

on the nature of the work that he actually does. And it is clear from the affidavit of Mr. Ebden sworn on the 20th of May 1936 that he did not confine his duties to merely collecting information and reporting that information to the Governor in Council. He went further and made recommendations, which sometimes modify the original proposals —(see affidavit paragraph 14). These recommendations appear to be accepted by the Governor in Council without alteration. In one case Mr. Ebden amended his own recommendation. This was with reference to the Anson Road back lane. After a communication with the Chairman of the Singapore Improvement Trust an order was made by the Governor in Council in accordance with the amendment recommended.

In view of such circumstances it would seem impossible to argue that Mr. Ebden was not acting as a judicial officer.

There are no rules of procedure as to how the enquiry should be carried out. In that respect the position seems to be very similar to that in the *Board of Education* v. *Rice*, (1911) A.C. 179. In that case Lord Loreburn L.C. said:—

> "In the present case as in many others what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will , I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

The officer appears to have attended with great patience to all that was advanced by the appellants. In the Anson Road scheme he actually made a suggestion that Fraser and Neaves should be approached with a view to their acquiring a portion of the property and this advice the appellants were prepared to adopt. In the South Bridge Road scheme the alternative was fully gone into. There was no real objection to the Waterloo Street scheme and the only objection, if it can be called an objection, was that it was not more extensive. I do not consider it necessary to go into all the steps taken by Mr. Ebden or to examine every step minutely; but I am satisfied that throughout, his conduct was fair and that the appellants were given the fullest opportunity for stating their views.

The main objection of the appellants rests in their suggestion that the enquiries were not finished, and that they were not given opportunities to reply. It must, however, be realised that there is nothing to say that the enquiry should take the course of a trial, and it was in fact conducted in the same way that such enquiries have been made in the past.

It has been stated that the appellants have been parties to such enquiries at various times and they have not objected to the method of enquiry. I should not be prepared to suggest that they were estopped from taking an objection on this account now; but knowing the nature of the enquiry, it would seem that they should have objected earlier, if they wished the established practice to be departed from.

I am therefore in agreement with the learned Acting Chief Justice that this objection cannot be sustained.

It has further been objected that Mr. Ebden was actually biassed in that as a Member of the Improvement Trust he approved of the scheme relating to back lanes prepared by the Singapore Trust. Mr. Ebden in paragraph 13 of his affidavit sworn on the 20th of May 1936 stated that:—

> "In no case, apart from taking part in the procedure notified above, have I taken personal part in the preparation of the schemes which are the subject of these proceedings or any other scheme."

Possibly such action might amount technically to bias within the ambit of the decisions which have been given by the Courts on that question. But it is not necessary to give a decision on this matter, since it is not one of the matters as to which the respondents have been ordered to show cause.

The appellants state that at the time the rule was obtained, they were not aware of these facts. In that case they should have applied for an amendment of the rule. It might be argued that the appellants have been deprived of a right owing to a technicality, but in as much as it is apparent that there was in fact no actual bias, the objection is purely technical. It is obvious that those who seek to take advantage of technicalities must themselves take care that they are not technically in error.

The next objection is that Mr. Ebden was biassed in that he was a member of the Singapore Improvement Trust, and therefore came within the rule that no man may be the judge in his own cause. The learned Acting Chief Justice was of the opinion that Mr. Ebden's position brought him within the range of cases which dealt with the question as to whether the existence of some

financial interest was near enough to affect a person with bias. [See *Reg.* v. *Rand* (1866), L.R. 1 Q.B. 230; *Reg.* v. *Handsley*, 1881, 8 Q.B.D. 383; *Reg.* v. *Farrant*, (1887), 20 Q.B.D., 58]. In the case of *Queen* v. *Farrant*, Stephen J. said:—

> "We cannot say that he is likely to have a bias merely because he suggested a settlement and advised the complainant not to go into a criminal Court. Then it is said that he is to be a witness at the hearing before the Magistrates. That may be a ground on which he may decide not to sit, but this is a matter for him to consider, not for us. It might cause great mischief if we were to hold as a matter of law that, because a Magistrate or a Judge is likely to be called as a witness, he is bound not to sit. Such a doctrine might cause great inconvenience as, for instance, if a Judge of assizes were subpoenaed just before the trial, the effect might be to necessitate a postponement to the next assizes, and it would be in the power of either party, by serving a subpoena, to prevent any particular Judge or Magistrate from sitting."

In the case of *Queen* v. *Rand*, Blackburn J. said:—

> "There is no doubt that any direct pecuniary interest, however small, in the subject of enquiry, does disqualify a person from acting as a Judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is; for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of the interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties it would be very wrong in him to act; and we are not to be understood to say, that when there is a real bias of this sort the Court would not interfere."

In *Queen* v. *Handsley*, Cave J. said:—

> "Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present where such a section as section 502 of this local Act exists, it is not enough to show merely that an adjudicating justice is a member of the Town Council, and, as such, has a pecuniary interest in the result of the complaint or information, or that he is a member of the Corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate upon, but that in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter."

The section in question is as follows:—

> "Except as expressly or otherwise provided, any person shall not be disqualified or disabled to act as justice of the peace, coroner, juror, or otherwise, in any matter arising under or in relation to this Act, by reason of his being a ratepayer in the borough or liable to any payments under this Act, or a member of the council or any committee thereof."

The facts in the case of *Queen* v. *Handsley* are the nearest to those in the present case. But there is no section of any local law in Singapore equivalent to section 502. I am satisfied from the language of Cave J. that the decision in *Queen* v. *Handsley* would have been different but for section 502.

I conclude that there did exist a fear of prejudice and a possibility of being considered to be biassed which would infringe the high criterion that not only must justice be done but also must appear to be done. In the present case it must be obvious that this is a pure technicality of which the appellants are entitled to avail themselves. But in order to enable them to do so they must strictly comply with the necessary essentials. And one of these is that the matter availed of must not have been known either to the appellants nor to their solicitor. [*Reg.* v. *Justices of Richmond*, 8 Cox. 314].

Mr. Afifi in his affidavit sworn on the 13th of May 1935 says in paragraph 10:—

> "The fact that the commissioner the officer appointed to enquire and report in the case on each of the back lane schemes above referred to was a Member of the Improvement Trust may have been knowledge available to the Public, but this Deponent did not and to the best of his knowledge information and belief the owners did not have such knowledge until in or about the month of November 1934."

The Court was informed by the advocates for the appellants at the commencement of the appeal that the appellants were very large owners of property in Singapore. If so, it is not the case of some humble person who might have no experience of such matters; but of wealthy persons largely interested in land who have no excuse for their lack of knowledge. But quite apart from such a question there is further the knowledge of their advocate. Mr. Mundell is one of the most prominent advocates in Singapore. It is not

necessary for him to deny knowledge of the fact if the party's own affidavit stated it—(see *Reg.* v. *Justices of Richmond*, 8 Cox. 314). In paragraph 5 of the affidavit sworn by Mr. Afifi on the 8th of August 1936 it is stated:—

> "I further say that I have been informed by H. D. Mundell the solicitor referred to in such paragraph (17) and verily believe that it is probable that at some time in 1933 (though at what time he cannot say now) he knew that Mr. W. S. Ebden was Commissioner of Lands in Singapore, and that when in February 1934 he appeared before the Singapore Improvement Trust in proceedings other than the subject matter of these proceedings he may have known that Mr. W. S. Ebden was a member of the Trust on or about the 16th March 1934, because on that day he perused and subsequently checked the minutes of the meeting of the Improvement Trust which he had attended in February 1934 and Mr. Ebden's name and description as Commissioner of Lands appeared in such minutes as one of the Members of the Trust present at the meeting. But Mr. Mundell has informed me and I verily believe that his knowledge in this respect, if ever realised, was forgotten and that he did not know or if he knew he did not remember that Mr. Ebden was a Member of the Improvement Trust until towards the end of November 1934 when he was requested by me to advise upon the possibility of bringing proceedings such as the present proceedings and at the time of the commencement of his investigations for the purpose of advising in this respect he was informed by me that Mr. Ebden was a member of the Improvement Trust. I have been further informed by the said H. D. Mundell and I verily believe that until towards the end of November 1934 when he was investigating the law applicable to the circumstances giving rise to the present proceedings he did not know that any objection to Mr. Ebden's acting as the Officer appointed to enquire and report could be made."

These may be excuses but hardly reasons which would enable the Court to say that neither the appellants nor their advocates knew that Mr. Ebden was by virtue of his post as Commissioner of Lands a member of the Improvement Trust.

The learned Acting Chief Justice says in his judgment that the knowledge of a solicitor acquired in other proceedings is not knowledge in these proceedings. I respectfully agree. But this is not such knowledge but a knowledge of the law which presumably he is expected to know. The learned Acting Chief Justice had some doubts on this point; therefore I have less hesitation in coming to a conclusion differing from his.

For the reasons I have given in this judgment I am of the opinion that the decision arrived at by the learned Acting Chief Justice was correct, and that therefore this appeal should be dismissed with costs. Two counsel were allowed in the Court below, and I consider that two counsel should be allowed on this appeal. The sum lodged in Court as security by the appellants to be paid out to the respondents or their advocates in respect of their taxed costs.

HOWES, J.—I have had the advantage of reading both the judgments of the Chief Justice, F.M.S., and of the Acting Chief Justice, S.S.

On the preliminary question whether His Excellency the Governor was properly made a party to these proceedings, I am in entire agreement. It seems to me that since the Executive Council is a purely advisory body and has no powers of itself, the responsibility for any decision made by the "Governor-in-Council" rests with him entirely. He is under no obligation to adopt the advice offered by the Executive Council. All that the expression "Governor in Council" means is that in matters to be so decided the Governor shall receive the advice of the Executive Council before arriving at a decision. Whether he rejects or accepts that advice, the result is the same—the final decision is made by the Governor.

A great deal of argument was directed to the position of Mr. Ebden and to the meaning of the words in section 148 (1) of the Municipal Ordinance, under which he as an officer was appointed by the Governor "to inquire and report on each case."

Mr. Braddell for the respondents, contended that the officer appointed is to do nothing more than collect information for the Governor, and has no power to make recommendations, although the practice has been for him to do so. Mr. Braddell instanced the case of a Magistrate deputising a police officer to inquire and report about a complaint before issuing a summons.

No definition of the expression "inquire and report" could be found; but to my mind, the words are analogous to those contained in section 14 (1) of the Arbitration Ordinance, under which a Judge may refer a question to any special referee "for inquiry or report."

No one would, for a moment, suggest that a referee so appointed is not in a quasi-judicial position, or that it was not necessary for him to hear evidence impartially and in the presence of both parties.

A special referee makes his report to the Court; the officer appointed under section 148 (1) of the Municipal Ordinance makes his report to the Governor in Council.

There is however this difference. In the first case the parties concerned have an opportunity of objecting to the report and can ask the Court to set it aside on certain grounds, one of which is that the referee was biased or not impartial. In the second case, since the proceedings in Executive Council are secret, the party concerned has no right of audience or opportunity of objecting to the report.

The repeal of the Municipal Ordinance 1913, under which the owners could be heard in person or by counsel before the Governor and object to a back-lane scheme, seems to me to emphasize the judicial character of the officer conducting the inquiry on which his report is founded.

Now that the Governor in Council does not hear objections, but makes his order on the report of the reporting officer (if he thinks fit to call for one), it seems to me that, for all practical purposes, the Governor has to a great extent relinquished the quasi-judicial position which he held under the 1913 Ordinance, and by the expression "to inquire and report" these duties have, by the Ordinance, been delegated to the reporting officer.

Reverting to the analogy of the reporting officer and a special referee; it seems to me that the former has a greater quasi-judicial responsibility than the latter, as, in the ordinary course, I assume the reporting officer's report would be adopted by the Governor in Council and there is no right of objection to it, or of appeal.

It follows that in the proceedings before the reporting officer not only must there be entire impartiality; but there must be no suspicion of bias, either real, or what is termed legal bias.

One of the grounds set out in paragraph 2 (3) of the Order *Nisi* (p. 93) is that "the said officer did not conduct the said enquiries or any of them in an impartial or judicial manner—

(a) in that he did not hear the case for the Singapore Improvement Trust in the presence of the owners or their representative,

(b) in that he did not inform the owners of the objections of the Singapore Improvement Trust to the proposals of the owners and give the owners an opportunity of replying thereto."

In para. 5 of their letter of the 21st August 1934 to the Commissioner of Lands relative to the South Bridge Road Scheme, the appellants' solicitors wrote (p. 49):

"If our clients' submission and suggestions are not agreed to they would like to have an opportunity of appearing before you with the writer and their architect, and explaining their attitude in connection with the proposed acquisition," and requesting that the enquiry should not be held until Mr. Afifi's return.

No answer was received to this letter, and the next thing which the appellants knew was that the order of the Governor in Council had been made on the 24th October 1934.

Mr. Ebden, in his affidavit (p.108) dealing with this objection stated:

"(4) that I understood the position to be that the objections raised by Messrs. Sisson & Delay with reference to the 'South Bridge Road' property were all being satisfactorily met, and that there was therefore no further necessity to hear them."

I have only quoted this one example as indicative of the somewhat "free and easy" lines on which the enquiries were conducted.

In my opinion, the learned trial Judge was wrong in his conclusion (p.231) that "Mr. Ebden was himself not even exercising quasi-judicial functions, but was merely enquiring and making a report and recommendation to those who were exercising such functions."

In this respect, I consider his judgment was founded on a fallacy. Under the present system, the Governor's decision must be founded on a report (if one is called for) and if there were irregularities in the inquiry on which the report is based, the Governor is acting on an improper basis.

No useful purpose will be served by my going through in detail the cases quoted by the learned Acting Chief Justice, S.S. I am in entire agreement with the conclusions to which he has arrived, and in my opinion the appeal should be allowed for the reasons given by him.

[COURT OF CRIMINAL APPEAL]

TERRELL, Ag. C.J.

HORNE & LAVILLE, JJ.

August 7, 1937.

RATNAM v. REX.

[SINGAPORE CRIMINAL APPEAL No. 4 of 1937]

Criminal law—murder—evidence pointing to accident—Judge's summing-up—jury directed that accused must be guilty of murder or culpable homicide not amounting to murder—misdirection.

A dispute arose between the appellant, an asphalt-mixer, and a European overseer, since deceased, in consequence of the deceased having called upon the appellant to vacate the coolie lines. Shortly afterwards both the appellant and the deceased were proceeding towards the office and in the course of the journey the appellant stabbed the deceased. The appellant was charged with murder. During the trial, in answer to a question put by the Judge, the appellant stated that he did not intentionally stab the deceased and the effect of his evidence was that the death was purely accidental. In his summing-up the learned Judge directed the jury that the whole case was whether the evidence by the defence was sufficient in